

E-filing **FILED**
MAY 05 2006
RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICTORIO M. STEPHENS,)	
)	
Plaintiff(s),)	No. C 05-4972 TEH (PR)
)	
vs.)	SECOND ORDER OF
)	DISMISSAL WITH LEAVE TO
COUNTY OF SANTA CLARA, et al.,)	AMEND
)	
Defendant(s).)	

Plaintiff, a prisoner at the Santa Clara County Jail in San Jose, California, has filed a pro se civil rights complaint for damages under 42 U.S.C. § 1983 claiming various violations of his federal rights. He also claims violations of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"). This Court previously dismissed Plaintiff's complaint with leave to amend on March 6, 2006 (docket no. 5).

On April 4, 2006, Plaintiff filed an amended complaint. However, in his amended complaint, Plaintiff failed to allege facts showing how each named defendant actually and proximately caused the constitutional deprivations of which he complains. Moreover, in the amended complaint, Plaintiff asserts that he does not know their "names and titles of certain medical and/or jail officials at this time, and they will be Does 1-20" until a later date. Because Plaintiff has not properly identified the parties he contends are liable for the conduct that violates his rights (and has not identified any conduct on the part of his "Doe" Defendants

1 1-20 at all), the complaint will again be dismissed with leave to amend. Plaintiff
2 must comply with the directives in filing his second amended complaint.

3 DISCUSSION

4 Although a plaintiff is not required to plead "specific factual details not
5 ascertainable in advance of discovery," *Gibson v. United States*, 781 F.2d 1334,
6 1340 (9th Cir. 1986), he does not state a claim under 42 U.S.C. § 1983 if the
7 allegations in the complaint are mere conclusions, *Kennedy v. H & M Landing,*
8 *Inc.*, 529 F.2d 987, 989 (9th Cir. 1976). A complaint must contain sufficient
9 allegations to put defendants fairly on notice of the claims against them.
10 *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). A complaint that fails to
11 state the specific acts of the defendant which violated the plaintiff's rights fails to
12 meet the notice requirements of Federal Rule of Civil Procedure 8(a).
13 *Hutchinson v. United States*, 677 F.2d 1322, 1328 n.5 (9th Cir. 1982). The
14 failure to comply with Rule 8(e), requiring each averment of a pleading to be
15 "simple, concise, and direct," is also a basis for dismissal. *McHenry v. Renne*, 84
16 F.3d 1172, 1179 (9th Cir. 1996) (affirming dismissal of complaint that was
17 "argumentative, prolix, replete with redundancy, and largely irrelevant").

18 In the earlier order of dismissal with leave to amend, this Court explained
19 to Plaintiff the legal requirements to state a claim for deliberate indifference to
20 medical needs under 42 U.S.C. § 1983 and under the Americans with Disabilities
21 Act. Plaintiff has again stated a state law claim for negligence in the failure of
22 certain jail officials to safely maintain the physical therapy equipment in his jail
23 housing facility. Plaintiff has identified Defendants Padgett, Ferry and Wong
24 with regard to this cause of action.

25 However, with regard to his federal claims, Plaintiff's factual allegations
26 fail to state a claim for relief. Further, Plaintiff does not separately identify how
27
28

1 he contends different individual Defendants violated his rights under those
2 statutes. In the first amended complaint, Plaintiff apparently seeks to raise claims
3 regarding the deprivation of orthopedic shoes and devices and the failure to
4 provide him with appropriate medical care after he suffered an injury on the
5 physical therapy equipment. However, he does not identify when and how these
6 claims arose and who was responsible for the violation of his rights. Plaintiff has
7 again failed to properly stated a claim. As such, this Court will again dismiss the
8 amended complaint. Plaintiff will be given one final opportunity to file an
9 amended complaint that states a violation of his federal rights.

10 The second amended complaint need not be lengthy. In fact, Plaintiff
11 would be better served by filing an amended complaint that includes short factual
12 statements about when and how each claim arose, rather than the lengthy general
13 allegations in his current complaint. He should also set forth allegations
14 regarding each claim separately. For example, with regard to his claim regarding
15 the denial of orthopedic shoes and a brace, Plaintiff must identify who prescribed
16 such devices for him and who deprived him of them and on what date. Plaintiff
17 has only made general statements that he saw certain doctors and later “was told
18 he had to wear regular jail “foot sandals” because his shoes were unauthorized.
19 See, First Amended Complaint at 8. Plaintiff’s complaint does not identify who
20 caused such a deprivation and how those actions violated his rights.

21 Similarly, in this Court’s earlier order, the Court informed Plaintiff of the
22 elements required to state a claim under the ADA. However, in the first amended
23 complaint, Plaintiff does not state a claim under that act, although it appears that
24 he is attempting to argue that the failure to provide recreational or physical
25 therapy equipment in 2-B Special Housing Medical Unit violates the ADA. If
26 Plaintiff wishes to assert such a claim, he must identify how certain actions by
27
28

1 specifically named Defendants violated that statute. Moreover, he must do more
2 than simply state that "Defendants" or "officials" deprived him of that benefit.
3 He must assert a specific claim, identify who violated his rights and how they did
4 so.

5 At the very end of Plaintiff's complaint, he states that he will inform the
6 Court later when he knows the identity of the Doe Defendants. However,
7 Plaintiff has not properly alleged liability against any Doe Defendants. In fact, he
8 has not mentioned any of them in the factual allegations in the complaint. This is
9 not a proper manner of alleging liability against unknown defendants.

10 Although the use of "John Doe" to identify a defendant is not favored in
11 the Ninth Circuit, see Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980);
12 Wiltsie v. Cal. Dep't of Corrections, 406 F.2d 515, 518 (9th Cir. 1968), situations
13 may arise where the identity of alleged defendants cannot be known prior to the
14 filing of a complaint. In such circumstances, the plaintiff should later be given
15 an opportunity through discovery to identify the unknown defendants, unless it is
16 clear that discovery would not uncover their identities or that the complaint
17 should be dismissed on other grounds. See Gillespie, 629 F.2d at 642; Velasquez
18 v. Senko, 643 F. Supp. 1172, 1180 (N.D. Cal. 1986).

19 If Plaintiff wishes to pursue a claim against any such Defendants, he must
20 name and number them separately and he must identify conduct by them in the
21 amended complaint which gives rise to liability. In other words, Plaintiff must
22 identify what the "Doe" defendants did that states a claim for relief. If there is
23 more than one such defendant, he can identify them by number, ie, "John Doe 1",
24 "Jane Doe 1", "John Doe 2", etc.

25 Although the use of Doe Defendants is acceptable to withstand dismissal
26 of the complaint at the initial review stage, Plaintiff is cautioned that using Doe
27
28

1 Defendants creates its own problem: those persons cannot be served with process
2 in this action until they are identified by their real names. Plaintiff must promptly
3 take steps to discover the names of the unnamed Defendants and provide that
4 information to the Court in an amendment to his pleading. The burden remains
5 on the Plaintiff; the Court will not undertake to investigate the names and
6 identities of unnamed defendants.

7 Moreover, if Plaintiff wants to include a municipality as a defendant, he
8 must use care in attempting to allege municipal liability. A municipality can be a
9 "person" subject to liability under § 1983 when its official policy or custom
10 causes a constitutional tort, but a municipality has no vicarious liability for the
11 unconstitutional acts of its employees under the theory of respondeat superior.
12 *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978); *see Plumeau v.*
13 *School Dist. #40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (to
14 establish municipal liability based on an official policy or custom, plaintiff must
15 show: (1) that he possessed a constitutional right of which he was deprived;
16 (2) that the municipality had a policy; (3) that this policy amounts to deliberate
17 indifference to the plaintiff's constitutional rights; and (4) that the policy is the
18 moving force behind the constitutional violation). A municipality also may be
19 liable for constitutional violations from its failure to supervise, monitor or train,
20 but only where that failure amounts to deliberate indifference to the rights of
21 persons with whom the municipality's employees come into contact. *See Canton*
22 *v. Harris*, 489 U.S. 378, 388 (1989).

23 CONCLUSION

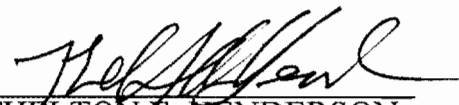
24 For the foregoing reasons, the complaint is dismissed with leave to amend,
25 as indicated above, within 30 days of this order. The pleading must be simple
26 and concise and must include the caption and civil case number used in this order
27
28

1 and the words SECOND AMENDED COMPLAINT on the first page. Failure to
2 file a proper amended complaint within the designated time will result in the
3 dismissal of this action.

4 Plaintiff is advised that the amended complaint will supersede the original
5 complaint and all other pleadings. Claims and defendants not included in the
6 amended complaint will not be considered by the court. See King v. Atiyeh, 814
7 F.2d 565, 567 (9th Cir. 1987).

8 SO ORDERED.

9 DATED: 5/5/06


10 THELTON E. HENDERSON
United States District Judge